



Building Owners and Managers Association
38800 Country Club Drive, Farmington Hills, MI 48331
GOVERNMENT AFFAIRS

April 28, 2015

Chairman Rick Jones
Senator Tonya Schuitmaker
Senator Patrick Colbeck
Senator Tory Rocca
Senator Steve Bieda

RE: Opposition to SB 149 in Current Form

BOMA members represent every aspect of our industry from building owners, building managers, real estate developers, and various suppliers including landscapers, roofers, janitorial services, utilities, construction firms and architects. We are primarily comprised of business owners who have made the choice to invest in Michigan. In Southeast Michigan the office market contributes 3 billion dollars in operational expenses to the economy and supports 27,000 jobs.

We have been following SB 149 since shortly after introduction because of the impact on potential claims involving design professionals. The bill seeks to impose a requirement for an "Affidavit of Merit" as a precondition for filing any "malpractice or negligence" action against a design professional in Michigan. Modeled loosely after the Medical Malpractice Affidavit of Merit requirement, the bill would mandate that any injured party obtain an independent expert review of the records available prior to the initiation of litigation to render an opinion that the standard of care was breached, and that the breach proximately caused the damages suffered. Some of the practical problems presented by this bill include:

1. There is no known "litigation crisis" or explosion of meritless litigation against architects or engineers that would warrant the imposition of an Affidavit of Merit. Only medical practitioners currently have that requirement in Michigan – not attorneys or accountants or any other licensed professional. If an expert is not identified before trial to render an opinion as to the violation of the standard of practice, a professional malpractice action against any licensed professional may be dismissed anyway. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 48; 436 NW2d 70 (1989). Sanctions could be imposed for a frivolous suit. MCR 2.114 However, no expert testimony is required where the negligence claimed is a matter of common knowledge and interpretation or where negligence can be inferred though the doctrine of *res ipsa loquitur*. *Thomas v McPherson Community Health Center*, 155 Mich App 700, 705; 400 NW2d 629 (1986). There is no such exception permitted in this bill.
2. There is no central repository of records on a construction project [similar to a medical chart], so the expectation of an expert to render an opinion of a breach of the standard of care and proximate causation without access to significant project records from various sources is problematic. The project records of the designer, constructor, consultants in addition to the owner would be necessary to render a meaningful opinion could only be obtained through subpoena following initiation of litigation.

3. The language of the bill is overbroad in requiring the Affidavit of Merit in “an action alleging malpractice or negligence against an architect or engineer,” so it could apply to suits unrelated to rendering professional services such as automobile negligence or slip-and-fall suits.
4. The bill is not clear as to whether it could apply to contractual claims asserting a failure to comply with certain performance requirements. If a design professional asserted that a breach of contract is in reality a malpractice or negligence action, a court could require an Affidavit of Merit even though the contract may be explicit regarding the performance requirement. The bill should specifically exempt any contract action from this requirement.
5. The requirement for an expert to render an opinion that “the breach of the standard of practice was the proximate cause of the alleged injury to the plaintiff” would necessarily preclude concurrent causes of the injury, and could effectively immunize the constructor from responsibility for construction defects, or it would make bringing a malpractice claim nearly impossible.
6. The bill does not require the architect or engineer to provide an Affidavit of Meritorious Defense with its answer, which is even a requirement in the medical malpractice context. [MCL 600.2912e]
7. This bill is unlike any other law in any of the other states with “Affidavit of Merit” statutes in the level of detail required before the case is filed.

Regarding S-1 Substitute:

The general comments 1, 3, 4, 6 and 7 above still apply.

1. S-1 delays the necessity to file an Affidavit of Merit until 56 days following a demand by the defendant design professional, which could be extended an additional 56 days upon a showing of good cause. While S-1 allows the plaintiff to voluntarily dismiss the complaint to avoid a dismissal with prejudice if the affidavit is not prepared by that date, there is no requirement on the defendant to engage in good faith discovery during that interim period. The defendant could potentially engage in dilatory tactics by refusing to produce necessary documents in order to jeopardize the plaintiff’s ability to obtain a competent affidavit of merit in a timely fashion. The court could determine if a further extension is warranted.
2. S-1 is not clear as to the effect of the failure of a defendant to request an affidavit of merit within 56 days after service of the complaint or arbitration demand. If the Affidavit of Merit is not timely requested, that ability to demand the Affidavit should be deemed to be waived.

SB 149 does not provide any benefit to the economy, will not generate any jobs, and increases cost to private and public building owners. Additional burdens are not consistent with Michigan’s strategic plan to be a competitive market that encourages development and investment. We urge you to consider the impact this bill will have on private and public entities and deny its passage.

For more information on BOMA, its members or issue positions please contact:

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